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Supreme Court, U.S.
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*In the*
*Supreme Court of the United States*

OCTOBER TERM 1997

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**WESTOWNE SHOES, INC.**
**AND CARL A. BIWER CO.,**

*Petitioners,*

*v.*

**BROWN GROUP, INC., BROWN SHOE COMPANY, FAMOUS FOOTWEAR COMPANY, BROWN GROUP RETAIL, INC., WOHL SHOE COMPANY and BROWN GROUP INTERNATIONAL, INC.**

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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# PETITION FOR WRIT OF CERTIORARI

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36 pp

## QUESTIONS PRESENTED

1. Westowne, a dealer in Brown's "Naturalizer" line of women's shoes, argued breach of contract, claiming it agreed to modification of the dealership agreement to limit dealers to sell only Naturalizers, in exchange for Brown's agreement to supply a Naturalizer casual shoe; that Westowne performed but Brown breached by failing to supply a merchantable casual shoe and in other respects. The court of appeals incorrectly assumed Westowne was claiming Brown breached its dealership agreement by imposing the exclusivity requirement, and therefore did not address the breach of the modified agreement.

Is a litigant denied its right of appeal when the grounds for appeal, although properly presented, are not addressed by the appellate court?

2. Westowne also pleaded and argued claims of promissory estoppel and misrepresentation supported by the affidavit of its president that it eliminated the competing brands in reliance on Brown's promise to supply a Naturalizer casual shoe and its representations it could do so. The court of appeals found Westowne would have agreed to the modification even without Brown's promise and misrepresentations.

Have lower courts expanded *Celotex*, *Anderson* and *Matsushita*, so that clarification and admonition by the Supreme Court are needed to protect Seventh Amendment rights against unwarranted factfinding in applying Fed. R. Civ. P. 56?

## PARTIES TO THE PROCEEDINGS

The case caption contains the names of all parties. Neither of the plaintiff-petitioner corporations have parent companies or non-wholly owned subsidiaries. Defendant-respondent Brown Group, Inc., has no parent company and it is the parent company of defendants-respondents, Brown Group Retail, Inc., and Brown Group International, Inc. None of the defendants-respondents have non-wholly owned subsidiaries. The parties designated as Brown Shoe Company, Famous Footwear Company and Wohl Shoe Company are corporate divisions and not separate corporate entities.

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*Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997).

## PETITION FOR WRIT OF CERTIORARI

Westowne Shoes, Inc., and Carl A. Biwer Co. (collectively referred to as "Westowne") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit on January 17, 1997, because the court of appeals departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power and decided important questions in a way that conflicts with relevant decisions of this Court, all within the meaning of Sup. Ct. R. 10(a) and (c).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition was filed on January 17, 1997. It is reprinted in the appendix hereto at App. A at 1-11. By order filed April 7, 1997, the Seventh Circuit denied a petition for rehearing. App. G at 69-70. The appeal to the United States Court of Appeals was from a decision, order and judgment in the United States District Court for the Eastern District of Wisconsin, all dated December 13, 1994. The plaintiffs moved for reconsideration in the district court which was denied by a decision and order dated May 16, 1995. The decision, order

and judgment granting summary judgment and the decision and order denying reconsideration are reprinted in the appendix hereto at App. C at 14-57, App. D at 58-64 and App. E at 65-66.

## JURISDICTION

On December 13, 1994 the United States District Court for the Eastern District of Wisconsin issued a decision and order dismissing Westowne's complaint. On May 16, 1995 the district court denied Westowne's motion for reconsideration. Judgment was entered March 19, 1996. Westowne timely appealed to the Seventh Circuit, which affirmed in an opinion and judgment filed January 17, 1997. On March 14, 1997, the Seventh Circuit accepted Westowne's motion for rehearing which was denied on April 7, 1997. This petition is being filed within ninety days of the denial of the motion for rehearing, as extended by Sup. Ct. R. 30.1.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED IN THIS CASE

### UNITED STATES CONSTITUTION: ARTICLE VII

"In Suits common at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be

otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Rule 56(b), (c) and (e), Federal Rules of Civil Procedure

Rule 3(a), Federal Rules of Appellate Procedure

Rule 28(a)(3), (4), (5) and (6), Federal Rules of Appellate Procedure

Rule 40(a), Federal Rules of Appellate Procedure

28 U.S.C. § 1291

Wisconsin Statutes Chapter 135

## STATEMENT OF THE CASE

### *A. Statement of Facts*

Brown manufactures "Naturalizer" shoes, a line of women's shoes that are principally a dress shoe. App. A at 2. Naturalizers are retailed primarily through a network of dealerships which operate "Naturalizer Specialty Stores." The dealers depend on an "in-stock" program under which Brown maintains large inventories of Naturalizer shoes from which the dealers can immediately replenish their stock. This permits the dealers to offer the complete Naturalizer line without tying up capital in large on-site inventories. App. A at 3.

There were "mutual agreements" between Brown and its dealers under which Brown sold the dealers store front

Naturalizer signs for One Dollar with the dealers agreeing: to purchase and concentrate on selling Naturalizer shoes; to maintain inventories of Naturalizers adequate to represent the line; and to participate in joint advertising to promote the Naturalizer name. Brown agreed not to put another Naturalizer dealership within a competitive radius and that the dealers would have access to the full Naturalizer line and would have first priority on reorders through Brown's in-stock program. App. J at 98-101.

During the 1970's Westowne developed Naturalizer dealerships in shopping malls in a number of Wisconsin communities including Madison, Milwaukee, Appleton and LaCrosse. App. J at 98, 102.

While agreeing to adequately represent Naturalizer, the dealers were free to supplement Naturalizer inventory with outside lines in categories that were needed but were not part of the Naturalizer line. In the early to mid 1980's the demand among Naturalizer customers for "comfort casual" shoes reached a point where they became essential to profitability. Because Naturalizer was void in that classification, dealers typically supplemented their inventory with a comfort casual shoe manufactured by San Antonio Shoe Company ("SAS"). App. J at 103-05.

As the Naturalizer dealerships flourished, a Brown affiliate, Wohl Shoe Company, began acquiring them. App. A at 3. By June 1987 it had acquired approximately half of the Naturalizer specialty stores. App. J at 118-19.

Recognizing its void in the increasingly important comfort casual classification, Brown attempted to develop "knock-offs" or imitations of the three best-selling SAS

comfort casual styles through an experimental "fitted upper program," a manufacture/assembly process in which the upper portion of the shoe was made abroad and imported for attachment to the rest of the shoe. Brown manufacturing and marketing management found the shoes failed quality control tests and did not conform to the samples Brown had made for its dealers and, without disclosing its inability to mass-produce merchantable SAS knock-offs, Brown obtained orders for the shoes from its dealers, including Westowne. App. A at 3; J at 105-11.

On June 11, 1987 Brown sent a letter to all Naturalizer dealers stating that because of a recent focus on product development, its Naturalizer line could offer "a complete and balanced selection across all the major classifications of women's footwear" so that Brown was adopting a policy under which only Naturalizer footwear could be carried in stores identified as Naturalizer specialty stores (the "purity policy") and that "all stores will be in compliance with this policy on or before March 1, 1988." App. J at 107-08.

When Westowne's president, Rudolph Schoenecker, first received Brown's June 11, 1987 letter, he did not believe Brown could then supply literally every classification of women's shoes. However, he had seen samples of and actually ordered Naturalizer's version of SAS comfort casuals in order to compare their customer acceptance with SAS. He was concerned about dropping the SAS line before actual market experience with the Naturalizer knock-offs. App. J at 108-09. However, Brown representatives assured him Brown had produced Naturalizer quality "stitch-for-stitch" versions of the SAS shoes, and that these shoes would be available for timely delivery in a variety of sizes and

colors so that Westowne could safely eliminate SAS shoes. Brown representatives also reiterated the Company's position that if Westowne did not "go pure" by eliminating SAS shoes, Brown would terminate Westowne's dealerships, and that although Westowne would still be able to purchase and sell Naturalizer shoes, it could not operate its stores as Naturalizer specialty stores utilizing the Naturalizer sign. App. J at 109-11, 115-16.

Westowne's Schoenecker avers that had he not been convinced by Brown's assurances and representations it was safe to do so, Westowne would not have eliminated SAS shoes and agreed to purity, and would have pursued its legal remedies. App. J at 111-12. Another option open to Westowne, had it been aware of Brown's problems in producing comfort casual shoes, would have been to continue operating as Naturalizer specialty stores and continuing to carry SAS shoes (like, as Schoenecker later learned, some of the other dealers were doing) until Brown worked out its production problems or forced the issue by suing Westowne to remove its Naturalizer signs. However, believing Brown's representations merchantable Naturalizer comfort casual shoes could and would be timely supplied, Westowne agreed to purity and dropped the SAS line. App. J at 112, 121-23.

Brown's problems in producing comfort casual shoes continued and all styles of the SAS imitations were dropped. App. J at 116, 120. Brown continued to insist that Westowne and most of its other dealers remain pure, although it allowed certain selected dealers to continue to operate as Naturalizer specialty stores while carrying SAS comfort casuals. App. J at 115-16, 121-23. In addition to the problem of having no comfort casual shoes to meet customer demands, Westowne and other dealers, by January

1989, could not get timely reorders of the popular styles of Naturalizer dress shoes. This occurred because Brown allowed the stores it owned through its Wohl Division to preempt the supply of key shoes, exhausting Brown's inventory in these shoes for extended periods. App. A at 3. Brown also made some Naturalizer styles available to its Wohl-operated shoe departments, but not to its independent dealers. Also, the Wohl stores obtained Naturalizers for fifteen percent less than the independent dealers paid. App. J at 118.

After sustaining substantial losses in sales and profit, with Brown's continuing refusal to permit reinstating the SAS line, and after learning Brown was permitting other selected dealers to continue carrying the SAS line, Westowne commenced suit against Brown in the Circuit Court for Waukesha County, Wisconsin. In its complaint Westowne alleged not only its original dealership agreement with Brown which permitted dealers to carry some outside lines, but also the 1987 modification of that agreement under which Westowne and other dealers agreed to go "pure" by eliminating SAS shoes, in exchange for Brown's agreement to supply a merchantable substitute supported by an in-stock program. Westowne alleged Brown breached the modified agreement by failing to supply merchantable comfort casual shoes and that its inability to meet increasing customer demand for these shoes caused substantial losses. Westowne also alleged other breaches including Brown's failure to maintain an in-stock program for its dealers with respect to both classic dress shoes and comfort casual shoes, and its failure to allow Westowne and other independent dealers access to the complete Naturalizer line. Westowne also alleged promissory estoppel based on Brown's promise to supply comfort casual shoes and Westowne's reliance on that

promise to its detriment, and a claim of misrepresentation based on Brown's untrue representation at the time it imposed purity that it could supply merchantable comfort casual shoes and its failure to disclose its difficulties in producing them. App. I at 80-90.

Brown removed the case to the United States District Court for the Eastern District of Wisconsin and moved for summary judgment. Westowne submitted the deposition testimony of the former Brown executive who had developed Brown's dealership network and the affidavit of Westowne's Schoenecker regarding the underlying dealership agreement between Brown and Westowne and the dealership letter agreements regarding the conditions for Westowne's use of the Naturalizer sign, its freedom to sell shoes not in the Naturalizer line, Brown's commitment to maintain "in-stock" support for dealer inventory and Brown's agreement dealers would have access to the entire Naturalizer line. Westowne also submitted evidence of the 1987 amended agreement in which Westowne agreed to go "pure" by eliminating the SAS line in exchange for Brown's agreement to produce and supply three patterns of merchantable Naturalizer comfort casual shoes styled after ("stitch-for-stitch knock-offs" of) corresponding SAS patterns. App. J at 98-109, 119.

In addition to Brown's June 1987 letter requiring purity but assuring dealers Brown could now offer Naturalizer shoes in all major classifications, the record also included Schoenecker's affidavit setting forth the assurances by Brown executives and sales representatives that Brown had produced and could supply Naturalizer "stitch-for-stitch knock-offs" of the three popular SAS comfort casual shoes with "in-stock" support in various colors and sizes so that Westowne could safely eliminate the SAS line. The record

also included written catalogs and price lists and a dealer buying guide specifically identifying the new Naturalizer comfort casuals and stating the time they would be available for delivery. The record also contained Schoenecker's contemporaneous correspondence to Brown and his affidavit showing Westowne agreed to eliminate SAS shoes and that it did so in reliance on Brown's assurances regarding Naturalizer's new comfort casuals. App. J at 108-11.

The record also contained evidence of Brown's undisclosed problems in producing properly fitting comfort casual shoes, Brown's failure to deliver these shoes and the fact that Brown dropped this line entirely. This evidence was in the form of deposition testimony from current and former Brown executives and production and marketing personnel, testimony from other dealers and the testimony and affidavit of Schoenecker. App. A at 3. The record also contained evidence that Brown permitted its company-owned Wohl stores to pre-empt orders on regular Naturalizer patterns which prevented Brown from timely filling the orders and reorders of independent dealers through the "in-stock" support program which had been part of the underlying dealership agreement. App. A at 3. There was also evidence there were Naturalizer styles and patterns that were made available to Brown's Wohl-operated stores that were not offered to Westowne and other independent dealers. App. J at 122.

The district court granted summary judgment dismissing the complaint in its entirety. The court held "the record contains only Schoenecker's statements" as evidence regarding the nature of the business relationship between the parties so that there was insufficient evidence to show a contractual relationship between Brown and Westowne and

that the correspondence and alleged oral conversations failed to supply the definite and certain terms necessary to create a contract. App. C at 21-25. In dismissing the promissory estoppel claim, the court found the promises alleged by Westowne were mere predictions or "expressions of hope" rather than promises and were therefore not actionable, and that since Schoenecker had ordered Naturalizer's new comfort casuals before receiving the purity letter and other assurances alleged, he did not rely on the letter and those assurances. App. C at 25-27. The court further found that Westowne's decision to go pure was a "business decision unrelated to anything Brown might have promised." App. C at 27. In dismissing the misrepresentation claim, the court held Brown was under no duty to disclose to Westowne information regarding Brown's problems in producing comfort casuals. The court also found that Schoenecker's testimony and averments were "not persuasive" and that before he got the purity letter Schoenecker knew whether or not Brown offered a "complete and balanced selection" and had "some knowledge" as to whether the new Naturalizer comfort casual series were "stitch-for-stitch" knock-offs, so that there was no reliance on Brown's representations. App. C at 32.

The court did not address Brown's alleged failure to maintain in-stock support regarding both the comfort casual shoes and classic Naturalizer dress shoes, nor did the court address the alleged failure to offer Westowne and other independent dealers the complete line of Naturalizer shoes. Westowne moved for reconsideration which was denied. App. D at 58-64.

On appeal Westowne raised the issues of whether there were material facts requiring a trial on its breach of

contract, promissory estoppel and misrepresentation claims. App. K at 126-27. In its statement of facts Westowne reviewed the formation of Brown's underlying agreements with Westowne and with other dealers, citing the testimony of the former Brown executive who made the agreements, the averments of Westowne's president and letter agreements contained in the record. App. K at 128-130. This review included Brown's agreement its dealers could carry outside lines in categories in which Brown was void, that in-stock inventory support for the dealers would be maintained and that the dealers would have access to the entire Naturalizer line. *Id.* Westowne also reviewed Brown's adoption of its "purity" policy, its effort to produce SAS-type comfort casual shoes, its undisclosed inability to produce casual shoes that fit through its "fitted upper program" and evidence the shoes did not conform to the samples Brown had made to show its dealers. App. K at 132-33. Westowne then reviewed the evidence of Brown's written and oral representations its new comfort casual shoes were available and that Westowne and other dealers, relying on Brown's representations and samples, ordered Brown's casuals to carry along with and "challenge" the SAS shoes though still able to carry outside lines because the purity requirement had not yet been imposed. App. K at 133. Westowne then reviewed the evidence of the modification of the dealership agreement including Brown's written and oral promises to produce and supply, with "in-stock" support, a merchantable comfort casual shoe in exchange for Westowne's agreement to "go pure" by eliminating SAS shoes, and Westowne's acceptance and agreement to eliminate SAS shoes in exchange for and reliance on Brown's promises. App. K at 133-35. Westowne then reviewed the evidence of the alleged breaches of contract including Brown's failure to supply the comfort casuals and its failure to support Westowne and

other dealers with its in-stock program by allowing its own Wohl-operated stores to deplete inventory in popular dress shoes, making them unavailable to fill the orders and reorders of the independent dealers. App. K at 135-38.

In its brief to the court of appeals Westowne presented a detailed legal and factual analysis attempting to demonstrate the basis on which a jury could find Westowne's dealership agreement with Brown constituted an ongoing, though terminable contractual relationship. App. K at 141-47. Westowne's brief went on to argue and attempt to demonstrate that during the existence of the dealership agreement between Westowne and Brown, the parties agreed to an amendment to the earlier agreement which had permitted dealers to sell shoes in classifications not manufactured by Brown's Naturalizer division as long as the dealers adequately represented the Naturalizer line. Westowne's brief then demonstrated the specific agreement between the parties providing that in exchange for Westowne eliminating SAS shoes Brown would deliver to Westowne, by the following season, Naturalizer versions of the three specific SAS patterns Westowne had been carrying. App. K at 147-51.

Westowne's brief then argued Brown's breach of this agreement by failing to supply merchantable comfort casual shoes and abandoning its effort to develop SAS-type comfort casual shoes that fit. App. K at 152. Westowne also argued Brown's breach of the dealership agreement by failing to provide in-stock support in key shoes. App. K at 153-54.

Westowne's brief went on to review Wisconsin law on promissory estoppel and misrepresentation and reviewed the facts of record in light of that law, attempting to

demonstrate specific promises and representations on which Westowne relied in eliminating SAS shoes and further arguing how Brown's failure to disclose its problems in producing merchantable SAS-type shoes constituted misrepresentation under Wisconsin law. App. K at 154-67.

In its decision, the court of appeals acknowledged the evidence in the record showing Brown failed to supply Westowne with the Naturalizer versions of the shoes it had promised and that Brown failed to support Westowne and the other independent dealers with its "in-stock" program, allocating its available inventory in key Naturalizer dress shoes to its company-owned stores, thus denying the independent dealers access to key Naturalizer shoes when they needed them. App. A at 1-3.

However, the court of appeals assumed Westowne was arguing it had a contractual entitlement to remain a Naturalizer dealer indefinitely and that Brown breached the dealership agreement by imposing purity. App. A at 3-4. The court of appeals did not address the question of whether, under the modified agreement, there was an enforceable contract under which Brown was to supply comfort casual shoes in consideration for Westowne's agreement to eliminate SAS shoes and whether Brown breached that contract by failing to supply the SAS substitutes when Westowne eliminated SAS shoes.

With respect to Westowne's arguments for promissory estoppel and misrepresentation, the court of appeals found Westowne would have gone pure even if Brown had not promised SAS substitutes and regardless of any representations concerning the "SAS knock-offs." App. A at

6-7. Accordingly, the court of appeals affirmed the district court's dismissal of the case.

Westowne petitioned the court of appeals for rehearing on the grounds that the court of appeals misapprehended that the contract breach claimed by Westowne was imposition of the purity program and that Westowne was thus making an untimely claim under the Wisconsin Fair Dealership Law, when, in fact, the claim Westowne had pleaded and consistently argued was a common law contract claim based on Brown's breach of the amended agreement in which Brown promised to supply casual shoes in exchange for Westowne's eliminating the SAS line. App. L at 169, 179. Westowne cited both Seventh Circuit and Wisconsin law stating that even parties to a relationship that is terminable can make mutually enforceable contracts. App. L at 177-79. In petitioning for rehearing, Westowne also made the point the court had not addressed Brown's breaches of its agreements to timely replenish Westowne's Naturalizer inventory through its in-stock program and its failure to offer Westowne access to the complete Naturalizer line. App. L at 179-81.

Regarding the claims of promissory estoppel and misrepresentation, in its petition for rehearing, Westowne explained that the court of appeals' finding Westowne would have gone pure despite Brown's promises and misrepresentations was contrary to the record, specifically the averments of Westowne's president that in the absence of Brown's assurances it had developed and could supply a quality substitute for SAS shoes, or if Brown had disclosed its problems in producing SAS-type comfort casual shoes, Westowne would not have eliminated SAS and gone pure but, rather, would have consulted counsel regarding remedies

or continued as a Naturalizer specialty store operator, but carrying SAS shoes. App. L at 170-71, 181-84. Westowne stated in its petition that the court's affirmance of summary judgment dismissing the promissory estoppel and misrepresentation claims based on the court's incorrect determination Westowne would have gone pure even in the absence of Brown's promises and misrepresentations, constituted an impermissible finding of fact denying Westowne its Seventh Amendment right to a jury trial. App. A at 84.

The court of appeals denied the petition for rehearing without comment. App. G at 69-70.

*B. Basis for Federal Jurisdiction.*

The district court had diversity and removal jurisdiction under 28 U.S.C. §§ 1332 and 1441. The plaintiffs Westowne Shoes, Inc., and Carl A. Biwer Company are both Wisconsin corporations located at Waukesha, Wisconsin. Defendants Brown Group, Inc., Brown Shoe Company, Famous Footwear Company, Brown Group Retail, Inc., Wohl Shoe Company and Brown Group International, Inc., are all Missouri corporations located at St. Louis, Missouri.

## REASONS FOR GRANTING THE WRIT

*I. Prescribing the Court of Appeals' Duty to Address and Decide Properly-Raised, Material Issues Is an Important Exercise of This Court's Supervisory Power Needed Here to Prevent Denial of Petitioners' Right of Appeal.*

A party aggrieved by a judgment or order of a district court may appeal therefrom as a matter of right. 28 U.S.C. § 1291; Fed. R. App. P. 3(a); *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Arizona v. Manypenny*, 451 U.S. 232, 244-45 (1981). In exercising that right the appellant is required to submit a brief containing a statement of the issues presented for review, a statement of facts relevant to those issues with appropriate references to the record, a summary of argument and an argument containing the appellant's contentions on the issues presented with reasons and with citations to authorities and the record relied on. Fed. R. App. P. 28(a)(3), (4), (5) and (6). In addition to raising the issues upon which the appeal is based, the appellant is required to develop those issues in its brief. *Freeman United Coal Min. v. OWCP*, 957 F.2d 302, 305 (7th Cir. 1992).

When the appellant meets these requirements and does properly present and develop the material issues on which its appeal is based, what duty is thereby imposed on the court of appeals? When, in *Freeman*, 957 F.2d at 305, the court stated: ". . . we have no obligation to consider an issue that is merely raised, but not developed in a party's brief," was the court acknowledging, as a corollary, that the court of appeals *has* an obligation to consider an issue that *is* both raised and developed in the appellant's brief? If so, and the

court of appeals does not address a material issue properly raised and developed by appellant, is the appellant denied his right of appeal? These are important questions raised in this petition.

There have been decisions and rulings in this Court and in the court of appeals suggesting that a litigant's right to appeal includes fair consideration of appeal issues properly raised. In *Blackburn v. Alabama*, 354 U.S. 393 (1957), a criminal case, this Court was "uncertain whether petitioner's claim . . . was passed upon by the Court of Appeals of Alabama" and therefore vacated the Alabama court judgment remanding it to that court to "pass upon this claim." In *Barr v. Matteo*, 355 U.S. 171, 172-73 (1957), the Court stated that where a particular defense asserted in that case had been "consistently pressed in the district court and in fact urged in the court of appeals itself," the "broad requirements of judicial power and its proper exercise should lead to consideration of [that] defense. . . ." In *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025-26 (7th Cir. 1988), the Seventh Circuit Court of Appeals reiterated the obligation of the appellant to brief the issues, but acknowledged the court's duty to provide a reasoned explanation for its decision on issues properly before the court.

Review should be granted in this case so that the Court can determine and explain the extent to which consideration of properly raised issues is inherent in the right of appeal and whether this petitioner was denied that right.

A major claim in Westowne's case was for breach of contract. Contrary to the assumptions of both the district court and the court of appeals, Westowne was *not* contending

Brown breached its dealership agreement by imposing "purity" in 1987 and requiring Westowne and Brown's other dealers to eliminate outside lines and sell only Naturalizer shoes as a condition of remaining Naturalizer dealers operating under the Naturalizer sign. Westowne's claim in this case did not challenge Brown's right to impose conditions for operating as a dealer or even its right to terminate dealerships. Westowne's claim was this: Under the original agreements between Brown and its dealers, prior to 1987, dealers were permitted to carry non-Naturalizer shoes in classifications not manufactured by Brown, provided the dealers adequately represented the Naturalizer shoes Brown did offer. Thus, Westowne, like other dealers, carried SAS comfort casual shoes because, due to high customer demand, these shoes were becoming increasingly important to dealer volume and profitability. In 1987 Brown's Naturalizer division decided to capture the comfort casual business it was losing to manufacturers such as SAS. Brown attempted to produce imitations or "knock-offs" of three styles of SAS shoes and represented to its dealers it had successfully done so. Brown then informed Westowne and its other dealers of a modification of the existing dealership agreement under which the dealers would be required to eliminate outside lines such as SAS and carry only Naturalizer shoes, and, in exchange for their agreement to do so, Brown would supply Westowne and other dealers with merchantable Naturalizer comfort casual shoes which were "stitch-for-stitch knock-offs" of the SAS patterns the dealers had been relying on. Westowne accepted this modification and agreed to eliminate SAS shoes by the proposed deadline in reliance on Brown's commitment to supply it with the specific Naturalizer versions of the SAS patterns identified in the catalogs, price lists and samples presented to Westowne by Brown. Brown breached this modified agreement by

failing to supply Westowne and other dealers with comfort casual shoes and abandoning its effort to produce them. This breach caused substantial damage to Westowne because Brown, though failing to supply comfort casual shoes which were so critical to dealer volume, refused to permit Westowne to reinstate SAS shoes and insisted on "purity" as a condition of remaining a dealer under the Naturalizer sign. In addition to Brown's failure to supply comfort casual shoes as a breach of the modified agreement, Westowne also alleged and presented evidence showing Brown also breached other terms of the dealership agreement under which Brown had agreed to provide priority "in-stock" support in Naturalizer shoes it did produce so that dealers could rely on timely replenishment of their inventories when Naturalizer shoes were ordered and reordered, and further agreed to offer and make available to the independent dealers the entire Naturalizer line.

These breaches of contract were pleaded and argued in the district court in resisting summary judgment. Aggrieved by the district court's grant of summary judgment and claiming the district court had both misconstrued its claim and impermissibly weighed evidence and found facts against it, Westowne appealed to the United States Court of Appeals. In that appeal Westowne: presented the issue of whether there were material questions of fact requiring a trial of plaintiffs' breach of contract claim; reviewed the facts in the record describing the original dealership agreement and the modification proposed by Brown and accepted by Westowne; and argued the definiteness and enforceability of the agreement modification and Brown's breach, appropriately citing to the record. App. K at 126, 129-38, 140-53.

The court of appeals failed to address the issues central to Westowne's appeal: is there evidence or inferences permitted by that evidence raising material issues of fact on whether there was a modification of the dealership agreement which Brown breached by failing to supply the comfort casual shoes it had promised in exchange for purity? Instead, the court of appeals incorrectly assumed

> Westowne argues that Brown committed a breach of contract by putting Westowne to the miserable choice of losing its Naturalizer dealership . . . or replacing the SAS shoes that it carried with inferior knock-offs. . . Westowne's argument is that the course of dealing between the parties . . . gave Westowne a contractual entitlement to remain a Naturalizer dealer indefinitely and forbade Brown to impose unreasonable conditions on the retention of the dealership, such as requiring the dealer to carry a substandard product.

App. A at 3-4. On this incorrect basis the court assumed Westowne was trying to pursue an untimely claim under the Wisconsin Fair Dealership Law disguised as a breach of contract action. But, as Westowne had argued in both the district court and court of appeals, Westowne's rights, which it could and would have pursued under the Wisconsin Fair Dealership Law had it been timely informed of Brown's decision to abandon its efforts to produce a merchantable comfort casual shoe, are rights that are in *addition* to a

dealer's remedies at common law,[1] such as an action for breach of contract. Thus, although Westowne's claim for breach of the modified dealership agreement was properly pleaded and presented both in the district court and the court of appeals, it was not addressed. Nor did the court of appeals address the other breaches alleged and demonstrated, the claims based on Brown's failure to provide in-stock support and failure to offer Westowne the entire Naturalizer line.

In its petition for rehearing, Westowne attempted to effectively articulate and demonstrate how the court had misapprehended and failed to address its breach of contract claim, citing the portions of the record constituting evidence of the contract and breach Westowne had argued in both the district court and court of appeals. App. L at 169-79. Rehearing was denied without comment. App. G at 69-70. Thus, through no fault of the petitioner, a major issue presented for review was not addressed and petitioner's right to appeal was, in effect, denied.

## *II. The Court of Appeals' Impermissible Factfinding, Denying Petitioners' Right to a Jury Trial on Their Promissory Estoppel and Misrepresentation Claims, Substantially Departed from the Usual Course of Judicial Proceedings and Conflicted with this Court's Guidelines in Summary Judgment Cases.*

The decisions of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby,*

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[1] Wisconsin Fair Dealership Law, § 135.025(2)(c), *Wis. Stats.*

*Inc.*, 477 U.S. 242 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), have been referred to as "the Supreme Court's 1986 trilogy of summary judgment cases." JAMES W. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.50 (3d ed. 1997). As many other courts have done since then, the district court in this case approached Brown's summary judgment motion with a view affected by this Court's language that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action,'" *Celotex Corp.*, 477 U.S. at 327, and that "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247-48. *See*, district court decision at App. C at 19-20. Despite this Court's language in *Anderson* that

> at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial,

477 U.S. at 249, and that "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *id.* at 255, courts and writers have become concerned that overuse of Fed. R. Civ. P. 56 has, in some instances, infringed upon Seventh Amendment rights and has resulted in meritorious cases being dismissed without benefit of the record being developed at trial. This concern was recently expressed by the Seventh Circuit Court of Appeals

in *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir. 1997):

> The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 172 (7th Cir. 1996); *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995); Samuel Issacharoff & George Loewenstein, "Second Thoughts About Summary Judgment," 100 *Yale L.J.* 73, 88-91 (1990). The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified (so far as the Seventh Amendment permits) to bring federal practice closer to the practice in the legal systems of Continental Europe, where there is no hard and fast line between pretrial and trial and where procedure is more summary and informal than in the United States.

Moore cites the concern since "the post-trilogy doctrine of federal summary judgment," that "encouraging increased use of summary judgment through more permissive doctrine" can lead to "more frequent judicial error" and "may eliminate cases that should have gone to trial. . . ." MOORE, ET AL., *supra*. ¶ 56.50. Moore warns that:

Unless judges ruling on summary judgment consistently make assessments of the case that are at least as accurate as the assessments that would result after trial on the merits, the increased use of summary judgment must be regarded as allowing the judicial system to assume more risk of throwing deserving claimants out of court. . . .

To the extent that more disputes are adjudicated by pretrial motion, cases are more frequently decided on a narrower record and by a judge rather than jurors. Although the Seventh Amendment is not violated when a court properly determines that a nonmovant lacks substantial evidence supporting his claim, making this determination via summary judgment rather than directed verdict nonetheless raises concerns related to the Seventh Amendment. A judge taking a case away from the jury at the summary judgment stage does so with less information than the judge doing so at trial or after a verdict. At or after trial, the judge ruling on a Rule 50 motion for judgment as a matter of law has seen not only the information reflected by summary judgment materials but also has actually seen and heard the witnesses, has had documents explained, has experienced full-fledged in-court cross-examination, and knows whether affiants and deponents maintained their stories in the more probing arena of trial.

MOORE, ET AL., ¶ 56.50. Moore finds that what is "Most troubling, . . ." is:

> the tendency of summary judgment proponents to overlook the degree to which decisions on the motion may not only be erroneous but also erratic and sometimes ideologically driven.

In addition to its claim for breach of contract, Westowne alleged promissory estoppel and misrepresentation claims based on Brown's misleading representations and promises that Brown could and would supply merchantable comfort casual shoes to Westowne and Westowne's reliance thereon. App. I at 82-83, 87-90. In its brief to the court of appeals Westowne reviewed extensive evidence in the record of Brown's specific representations it had developed and could supply comfort casual shoes, specific patterns of these shoes Brown promised it would deliver for the following season and Brown's failure to disclose its problems producing these shoes which, under Wisconsin law[2] rendered even expressions by Brown of opinion regarding the quality and availability of the shoes actionable as misrepresentation. App. K at 154-57, 164-65.

The court of appeals did accept as true, for summary judgment purposes, the facts that Brown had told Westowne it would provide the shoes, that they would be quality imitations of the SAS shoes, but that due to Brown's inability to produce them, the shoes turned out to be inferior and unmerchantable. App. A at 3. However, the court affirmed

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[2] *Lundin v. Shimanski*, 124 Wis. 2d 175, 192, 368 N.W.2d 676, 684 (Ct. App. 1985) ("statements of opinion are actionable if the speaker knows of facts incompatible with his opinion").

dismissal of the promissory estoppel and misrepresentation claims because it found, contrary to the record, that Westowne would have "gone pure" even if Brown had not promised merchantable comfort casuals and regardless of its misrepresentations regarding the shoes. App. A at 6-7. In response to the district court's conclusion that because Westowne "could have but chose not to" remove the Naturalizer sign and reintroduce SAS shoes so that going pure was not Westowne's only option, Westowne reviewed for the court of appeals the extensive evidence in the record showing that taking down the Naturalizer sign and giving up its identity as a Naturalizer dealership would have caused Westowne insurmountable losses. App. K at 161-62. Westowne also demonstrated in the court of appeals that if it had not been convinced by Brown it was safe to do so, it would not have agreed to purity or dropped SAS shoes. App. K at 135. Westowne cited the evidence from its president stating:

> Had I remained concerned about Naturalizer's ability to supply us with a quality comfort casual shoe to substitute for the SAS, or had I believed some of the independent dealers would be allowed to continue carrying outside lines while still retaining their dealership and others not, I would not have agreed to purity and would have consulted an attorney to pursue such legal remedies as were available to me.

App. J at 112. The court of appeals' erroneous conclusion and impermissible factfinding is demonstrated by the language in its decision that:

> Yet at the same time [Westowne] argues that it had to go pure because it could not afford to give up the Naturalizer sign. This means that it would have gone pure even if Brown had not promised a perfect substitute. So the promise made no difference. The promise is also the basis for Westowne's claim of misrepresentation and fails for the same reason. Fraud is not actionable without harm. If, as Westowne itself asserts, it would have gone pure to retain its dealership regardless of any representation concerning the SAS knock-offs, those representations caused it no harm. No harm, no tort.

App. A at 6-7. The court's statements Westowne would have gone pure even in the absence of Brown's promises and representations and that "Westowne itself asserts" this, have no basis in and are, in fact, contrary to, the record.

In petitioning the court of appeals for rehearing, Westowne again cited the evidence that in the absence of Brown's promises and representations Westowne would not have eliminated SAS shoes, and urged upon the court that its conclusions and finding the promises and representations made no difference because Westowne would have gone pure in any event constituted impermissible findings of fact denying Westowne a jury trial on relevant issues of fact in violation of Westowne's rights under the Seventh Amendment. App. A at 181-84. As noted above the petition for rehearing was denied without comment.

Whether in granting summary judgment by a district court or in affirming a summary judgment by the court of

appeals, judicial factfinding and denying the nonmovant the benefit of permissible inferences departs "from the accepted and usual course of judicial proceedings" and "conflicts with relevant decisions of this court." Like the district court, the court of appeals may not resolve factual disputes or weigh conflicting evidence. *Weiler v. Household Finance Corp.*, 101 F.3d 519, 523 (7th Cir. 1996). This Court should grant review to preserve the petitioners' right to a jury trial and to remind lower courts that the decisions in *Celotex Corp.*, 477 U.S. at 317, *Anderson*, 477 U.S. at 242, and *Matsushita*, 475 U.S. at 574, should not be read as weakening the prohibition against judicial factfinding.

## CONCLUSION

The petitioners' case is yet to be fairly heard. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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